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No. 88-858

IN THE

Supreme Court of the United States

October Term, 1988

SUE WELLS, ETC. ET AL.,

Petitioners

vs.

WOODSON D. WALKER. ET AL.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the Federal Rules of Civil Procedure require a complaint to contain detailed facts upon which the claim is based or whether an allegation of willfulness, wantonness, recklessness, or gross negligence is sufficient.

LIST OF PARTIES

Petitioners

Sue Wells
Barbara Patton
John Sanderlin
Tom Sanderlin

Respondents

Woodson D. Walker
Bobby L. Roberts, Ph.D.
James L. Mason
A. L. Lockhart
Clifton Lambert
Morris "Jit" H. Dreher
Donald H. Smith

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JURISDICTION

Judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 26, 1988. Petition for Rehearing was denied on August 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is *Wells vs. Walker*, 852 F.2d 368 (1988). The opinion of the United States District Court for the Eastern District of Arkansas is *Wells vs. Walker*, 671 F.Supp. 624 (1987).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Amendment 14, §1, Constitution of the United States, provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 8, Federal Rules of Federal Procedure, provides in pertinent part:

(a) Claims for Relief. A pleading which sets forth a claim for relief, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) a party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

STATEMENT OF THE CASE

Petitioners are the children of Laverne Sanderlin, deceased, representing the estate of the deceased and themselves. Respondents are members of the Arkansas State Board of Correction and the Director and an employee of the Department of Correction.

Petitioners' claim for relief under 42 U.S.C. §1983 arises out of the wrongful death of Mrs. Sanderlin on April 21, 1987 at the hands of Larry Dean Robertson after he was granted an early release from the Department of Correction pursuant to Act 418 of 1987, Acts of Arkansas. Act 418 is known as "The Prison Overcrowding Emergency Powers Act of 1987." Petitioners alleged in their Complaint that Respondents knew or should have known that Act 418 was unconstitutional under the Arkansas Constitution.

Robertson was convicted in Johnson County, Arkansas of Felon in Possession of a Firearm and given an 18-month sentence. At the time of his arrest in Arkansas he was wanted in Mississippi for Grand Larceny and Burglary of a Dwelling. Prior to his conviction in Arkansas he had been convicted in Mississippi of Aggravated Assault.

In 1983 The Arkansas Legislature enacted Act 223 of 1983 which was known as "The Prison Overcrowding

Emergency Powers Act." Act 223 authorized the Governor to declare a prison overcrowding state of emergency and commute or otherwise reduce the sentence of certain certified inmates by 90 days. From its effective date in 1983 until its repeal on March 26, 1987, the Act was never invoked by the Governor.

On March 26, 1987 the Governor signed Act 418 of 1987. Act 418 had an emergency clause and became effective immediately. It also specifically repealed Act 223 of 1983. Act 418 of 1987 authorized the State Board of Correction rather than the Governor to declare a prison overcrowding state of emergency and move up the minimum release date of certain inmates by up to 90 days.

On Friday, April 17, 1987, less than one month after the enactment of Act 418, the Board of Correction met and voted to declare a prison overcrowding state of emergency. The Board voted to accept the Director's certification of the inmates who were Class I and II and authorized the release of all inmates contained on the list except those that the Director would identify to the Board by Wednesday, April 22 as being exempt or that any Board member would so identify. Robertson was on the list and was released on Monday, April 20.

Prior to his release Robertson was given a $25 check by the Department of Correction. He was then taken by an employee of the Department of Correction

to a fabric store in Dumas operated by Mrs. Sanderlin and released. The fabric store also served as the bus station. An Arkansas Statute required the Department of Correction to provide transportation for an inmate being released to the closest commercial transportation pick-up point. Robertson was released at the fabric store at approximately 6:50 p.m. on April 20 after the last bus for the day had run.

At approximately 1:30 p.m. the following day, Robertson brutally murdered Mrs. Sanderlin during a robbery by stabbing her in the eye with a pair of scissors. (Robertson has now been convicted of capital murder.)

Petitioners filed suit in the United States District Court for the Eastern District of Arkansas seeking relief under 42 U.S.C. §1983. The District Court dismissed Petitioners' §1983 claim pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. The District Court's decision was based upon an Eighth Circuit case which the District Court found to be controlling. The District Court held that the Eighth Circuit case it found to be controlling severely circumscribed the factual situations under which a "special relationship" giving rise to §1983 liability may be found. The District Court stated that Respondents may have been negligent or even reckless in releasing Robertson, a question which the District Court did not reach.

Petitioners appealed to the United States Court of

Appeals for the Eighth Circuit. The Court of Appeals held that the case relied upon by the District Court did not foreclose §1983 liability, but went on to hold that Petitioners' §1983 action was bottomed on a claim of ordinary negligence and that negligent conduct by government officials cannot be the source of a deprivation of constitutional rights for §1983 purposes. The Court of Appeals, therefore, affirmed the District Court in dismissing Petitioners' Complaint for failure to state a claim upon which relief can be granted.

Petitioners alleged in their Complaint, among other things, that Respondents' actions were willful, wanton, reckless, and grossly negligent. Additionally, Petitioners alleged that Respondents knew or should have know that the law under which they released Robertson was unconstitutional.

Petitioners now file this Petition for Writ of Certiorari for the reason that the United States Court of Appeals for the Eighth Circuit has decided the requirements of pleading under the Federal Rules of Civil Procedure in conflict with applicable decisions of this Court.

ARGUMENT

The question presented for review is whether the Federal Rules of Civil Procedure require a complaint to contain detailed facts upon which the claim is based or whether an allegation of willfulness, wantonness, recklessness, or gross negligence is sufficient.

The launching point for litigation such as this is *Martinez vs. State of California*, 444 U.S. 277 (1980). In *Martinez*, the survivors of a fifteen-year-old girl who had been murdered by a parolee five months after his parole brought an action for damages under state law and §1983 against those state officials who were responsible for the parole-release decision. It was alleged that the state officials' conduct in releasing the parolee (a mentally disturbed, convicted sex offender who had been imprisoned without recommendation for parole) had deprived the victim of her life without due process of law. This Court held that the parole board did not "deprive" the survivor's decedent of her life within the meaning of the Fourteenth Amendment. In so holding, this Court said:

> Her life was taken by the parolee five months after his release. He was in no sense an agent of the parole board. Cf. *Scheuer vs. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683, 71 Ohio Ops2d 474. Further, the parole board was not

> aware that appellants' decedent, as distinguished from the public at large, faced any special danger. **We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole.** But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the Federal Civil Rights Law.

(Emphasis supplied.) Id. 285. Thus, this Court clearly left open the possibility that on other facts the Fourteenth Amendment right asserted in *Martinez* might be upheld in a §1983 suit.

The result in *Martinez* does not require a dismissal of the §1983 claim in Petitioners' case because the cases are distinguishable on their facts. First, in *Martinez* the homicide occurred five months after the release while in the case at bar it occurred less than 24 hours after the release. Second, in *Martinez* there was no special relationship between the parole board and the victim of the homicide. The victim was simply a member of the public at large. In the case at bar Respondents gave the inmate $25.00 and released him at Mrs. Sanderlin's place of business, a point of public transportation. This was done in accordance with a state statute and was done

after the last bus for the day had run. Third, the inmate in *Martinez* was released on parole while the inmate who murdered Mrs. Sanderlin was released under a law that Respondents knew or should have known was unconstitutional. The inmate was not released on parole. If it had not been for Respondents' actions under a law they knew or should have known was unconstitutional, the inmate would have been confined in the Department of Correction at the time he murdered Mrs. Sanderlin.

In a recent case, the Court of Appeals for the Sixth Circuit in *Nishiyama vs. Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987) reversed the District Court in dismissing a §1983 claim for failure to state a claim upon which relief could be granted. In *Nishiyama*, a convicted felon was an inmate in the custody of the Dickson County, Tennessee Sheriff's Department. He had been placed on trusty status even though the defendants were on notice that he was dangerous and had assaulted a young woman in the past. The defendants had a policy and practice of several months' standing which allowed the inmate to have unsupervised use of Dickson County patrol cars equipped with standard blue flashing lights and official identifying markings. The inmate used the cars to perform official and personal tasks for the defendants and personal tasks for himself. One night the inmate drove one of the defendants from the jail to the defendant's farm. He used the fully equipped and clearly marked patrol car for this mission and was to drive himself back to the jail afterwards. The inmate then

began roaming the highways of Dickson, Houston, and Montgomery counties. He stopped several motorists by flashing the patrol car's blue lights. When Montgomery County officials learned that a Dickson County Sheriff's car was stopping motorists in their county, they notified the Dickson County dispatcher, who in turn notified the defendants. The defendants did nothing. It was not until ten hours later that the inmate returned to the jail. In the interim he stopped the plaintiffs' daughter's car and murdered her. The plaintiffs filed suit under §1983 and alleged that the defendants' gross negligence proximately caused their daughter's death. The Court held that the plaintiffs' allegations of gross negligence on the part of the defendants were sufficient to charge them with arbitrary use of government power and state a claim for a substantive due process violation that would withstand a motion to dismiss. Id. 282. In the case at bar, are Respondents any less culpable because they did not give Robertson a police car to stop potential victims when they drove him to Mrs. Sanderlin's place of business pursuant to State Statute and released him without warning? Of course not.

The case at bar is similar to Grimm vs. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977). In *Grimm* the plaintiffs brought a wrongful death and personal injury suit against members of the parole board alleging that they were grossly negligent and reckless in the release of a prisoner who caused the harm for which the plaintiffs sought redress. The

plaintiffs alleged that the release of the prisoner was in violation of an Arizona statute and was in excess of the legal authority of the board members. Id. 1229. The Arizona Supreme Court said:

> We hold that members of the State Board of Pardons and Paroles owe a duty to individual members of the general public when the board decides to release on parole a prisoner with a history of violent and dangerous conduct towards his or her fellow human beings. The standard of care owed, however, is that of avoiding grossly negligent or reckless release of a highly dangerous prisoner. If the history of an applicant for parole shows a great danger of violence to other humans, the members of the Board are under a duty to inquire further before releasing the prisoner. With medical and psychological evaluations, plus the day-to-day evaluations of the prison personnel, the Board should have access to sufficient information to make an informed decision. If the entire record of the prisoner reveals violent propensities and there is absolutely no reasonable basis for a belief that he has changed, then a decision to release the prisoner would be grossly negligent or reckless.

Id. 1234. The Court went on to say:

> Because we hold that members of the Board of Pardons and Paroles have only partial immunity from suit, the trial court's grant of summary judgment for appellees was error. Appellants should have a chance to show that the Board's release of Mitchell Thomas Blazak was grossly negligent or reckless as well as a chance to prove the other elements of their personal injury suit.

Id. 1237. In the case at bar the Emergency Powers Act (which Petitioners contend was unconstitutional) was invoked on Friday afternoon and Robertson was released on Monday. Did Respondents have time to do a proper evaluation and make an informed decision? Petitioners should have a chance to show that the release of Robertson was grossly negligent or reckless.

The question now before this Court is whether Petitioners' Complaint states a claim upon which relief can be granted. Petitioners acknowledge that the Complaint may be dismissed for failure to state a claim if it appears beyond doubt that Petitioners can prove no set of facts in support of their claim which would entitle them to relief. Petitioners also concede that mere negligence by government officials cannot be the source of a deprivation of constitutional rights for §1983 purposes.

For purposes of the motion to dismiss, the

complaint is construed in the light most favorable to the plaintiff and its allegations are taken as true. A Court's inquiry is, therefore, directed to whether the allegations constitute a statement of a claim under Rule 8, Federal Rules of Civil Procedure.

The Court of Appeals for the Eighth Circuit held that Petitioners' Complaint failed to state a claim upon which relief can be granted because the factual allegations amounted to nothing more than ordinary negligence by Respondents. This is in conflict with applicable decisions of this Court.

Conley vs. Gibson, 355 U.S. 41 (1957) is controlling. There, Mr. Justice Black, speaking for this Court, said:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Id. 45 and 46. Mr. Justice Black also said:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive

> answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. 47 and 48.

It should be noted that this Court referred to the illustrative forms appended to the Rules. Form 9 is a

complaint for negligence. The paragraph alleging negligence reads as follows:

> 2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

No specific facts as to how defendant was negligent are included in the Form. The simple statement that "defendant negligently drove a motor vehicle" is sufficient. Form 10 is a complaint where the evidence may justify a finding of willfulness or of recklessness or of negligence. The pertinent paragraph reads as follows:

> 2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant C. D. or E. F. or both defendants C. D. and E. F. willfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

Again, no specific facts of willfulness, recklessness, or negligence are required. The simple allegation of willfully or recklessly suffices.

In the case at bar, Paragraph 58 of the Complaint contains allegations that the acts and omissions of

Respondents were "willful, wanton, reckless, deliberately and callously indifferent, grossly negligent, and in reckless disregard of the consequences from which malice may be inferred." There are other similar allegations in Paragraphs 61 and 66.

Under Forms 9 and 10 appended to the Rules, a simple allegation of negligence, willfulness, or recklessness is sufficient. Specific details or facts of negligence, recklessness, or willfulness are not required. In the case at bar, Petitioners' allegations of willfulness, wantonness, recklessness, and gross negligence should also be sufficient. Petitioners should not be penalized because counsel elected to add in facts that were not necessary.

It is difficult to draw fine lines of distinction between the various gradations of the standard of care. Professor William L. Prosser discusses degrees of care and recognizes the difficulty of distinguishing them. Prosser and Keeton on Torts, §34 (5th Ed.). He says: "Nevertheless, the idea of degrees of negligence, or at least some kind of aggravated negligence which will result in liability where ordinary negligence will not, has been adopted in a number of judicial opinions and statutes." He defines or attempts to define gross negligence and concludes by saying: "There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less perhaps

than conscious indifference to the consequences." He then discusses willful, wanton, and reckless. He concludes by saying, "As a result there is often no clear distinction at all between such conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence, **differing in quality rather than in degree from ordinary lack of care.**" (Emphasis supplied.)

When a case depends on one of these gradations of the standard of care, it should be fully developed on its actual facts. This does not mean that it has to go all the way to trial. It should, however, be fully developed by discovery. In many cases, and this is one of them, many of the facts are within the exclusive control and possession of the defendant, such as, in the case at bar, the inmate's medical records at the penitentiary. Who knows what they would show? There may be evidence in there that would raise Respondents' conduct above mere negligence beyond any doubt. if this case is dismissed at this time, no one outside the circle of Respondents will ever know what that evidence is. If there is no basis in fact for Petitioner's claim, that can be shown through discovery and then the case may be terminated by summary judgment where the parties have to meet facts with facts rather than rely on the mere allegations of the pleadings. This case is simply not ripe for determination. A dismissal with prejudice on the "basis of bare bones pleading is a tortuous thing." *Shull v. Pilot Life Insurance Company*, 313 F.2d 445 (5th Cir. 1963).

In *Scheuer vs. Rhodes*, 416 U.S. 232 (1974), the personal representatives of the estates of three students who died during a civil disorder on the campus of Kent State University brought suit under §1983 against the governor, the Adjutant General, and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the president of Kent State University. In delivering the opinion of this Court, Mr. Chief Justice Burger said:

> The complaints in these cases are not identical but their thrust is essentially the same. In essence, the defendants are alleged to have "intentionally, recklessly, willfully and wantonly" caused an unnecessary deployment of the Ohio National Guard on the Kent State Campus and, in the same manner ordered the guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. Both complaints alleged that the action was taken "under color of state law" and that it deprived decedents of their lives and rights without due process of law. Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office.

* * *

The primary question presented is whether the District Court acted prematurely and hence erroneously in dismissing the complaints on the stated ground, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim.

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

* * *

Analyzing the complaints in light of these precedents, we see that petitioners allege facts

> that demonstrate that they are seeking to impose individual and personal liability on the named defendants for what they claim—but have not established by proof—was a deprivation of federal rights by these defendants under color of state law. Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure, are not barred by the Eleventh Amendment. Consequently, the District Court erred in dismissing the complaints for lack of jurisdiction.

In *Scheuer*, as in the case at bar, the plaintiffs alleged that the defendants acted intentionally, recklessly, willfully and wantonly.

As has been argued before, a detailed statement of the circumstances constituting negligence, gross negligence, willfulness, or recklessness is not required. In *Townsend v. Kiracoff*, 545 F.Supp. 465, 468 (1982), the Court quoted with approval from Wright and Miller, Federal Practice and Procedure: Civil §1249 as follows:

> A detailed statement of the circumstances constituting negligence is not necessary or desirable and a general allegation of negligence will be sufficient. . . . if the defendant needs

details as to the specific manner in which he is claimed to be negligent, he can obtain them under the provisions of discovery.

The same would be true as to allegations of gross negligence, willfulness, or recklessness.

This is a novel case. It arises out of the tragic death of Laverne Sanderlin. Many people view civil rights cases with disfavor because they see them protecting rights of only the guilty, i.e., prisoners or others who have done something wrong. That impression may not be accurate, but it is a view shared by many. But for the tragedy involved in this case, it would be refreshing in that it is a case of someone who is truly innocent seeking vindication for a violation of civil rights. Petitioners deserve the right to have this case fully developed on its actual facts. See *Shull vs. Pilot Life Insurance Company*, Supra.

In conclusion, specific details as to the standard of care should not be required in pleadings. The allegations of gross negligence, willfulness, and recklessness should suffice. The fact that Petitioners' attorney has alleged more facts than were necessary should not be taken to mean that there are not other acts that could be developed to show that Respondents violated a higher standard of care than mere negligence. Discovery will show what the actual facts are. If there are not sufficient facts then the case can be concluded by summary

judgment where the parties must meet facts with facts rather than rely on the allegations of the pleadings. Petitioners are entitled to substantial justice. This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 87-2547

Sue Wells, Administratrix of
the Estate of Laverne Sanderlin,
Deceased, Representing herself,
Barbara Patton, John Sanderlin,
Tom Sanderlin and the Estate of
the Deceased; Sue Wells, Barbara
Patton, John Sanderlin, and Tom
Sanderlin, individually and as
taxpayers of the state of Arkansas,
Appellants,

v.

Woodson D. Walker, Bobby L. Roberts,
Ph.D., James L. Mason, all individually
and in their official capacities as
members of the Arkansas State Board of
Correction; A. L. Lockhart, individually
and in his official capacity as Director
of the Arkansas Department of Correction;
and Morris "Jit" H. Dreher and Donald
H. Smith, in their capacities as members
of the Arkansas State Board of Correction;
and the Arkansas Department of Correction,
Appellees.

Appeal from the United States District Court
For the Eastern District of Arkansas.

Submitted: May 9, 1988
Filed: July 26, 1988

Before FAGG, Circuit Judge, SNEED,* Senior Circuit Judge, and MAGILL, Circuit Judge.

FAGG, Circuit Judge.

Plaintiffs appeal the dismissal under Federal Rule of Civil Procedure 12(b)(6) of their 42 U.S.C. §1983 action against the Director and an employee of the Arkansas Department of Correction (the Department) and members of the Arkansas State Board of Correction (the Board). *See Wells v. Walker*, 671 F.Supp. 624, 627 (E.D. Ark. 1987). We affirm.

Larry Dean Robertson was released from Department custody under an Arkansas statute authorizing the Board to accelerate the release dates of state prisoners by up to ninety days when specified prison overcrowding conditions are reached. *See* Ark. Code Ann. §§12-28-601 to 12-28-606 (1987). When Robertson was released, he was "provide[d] transportation * * * to

*The HONORABLE JOSEPH T. SNEED, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

the closest commercial transportation pick-up point" in conformity with state law. *See id.* §12-29-112(b). In this instance, that pick-up point was a store operated by Laverne Sanderlin in Dumas, Arkansas, that also served as a bus station.

Plaintiffs' complaint states two buses run through Dumas each day, one at 11:54 a.m. and the other at 6:30 p.m. According to the complaint, after Robertson was released he was given a check for twenty-five dollars and dropped off at the Dumas bus station at approximately 6:50 p.m. on April 20, 1987. Robertson did not board a bus the following morning, and at approximately 1:30 p.m., Robertson murdered Sanderlin at her store.

Plaintiffs are family and representatives of Sanderlin's estate who seek damages for Sanderlin's death under section 1983 and state law. Plaintiffs' suit is based on their claim that defendants' actions in releasing and transporting Robertson to Sanderlin's store, without a warning he was dangerous, deprived Sanderlin of her life and infringed her liberty interest in personal security in violation of her substantive due process rights.

Relying on *Harpole v. Arkansas Department of Human Services*, 820 F.2d 923, 926-27 (8th Cir. 1987), the district court concluded no special relationship existed that made Robertson's conduct while a free man attributable to the state, and consequently, that Sanderlin had no constitutional right to be protected

"from [Robertson's] actions once he was freed. *Wells*, 671 F.Supp at 627. For this reason, the court granted defendants' motion to dismiss the section 1983 claim and dismissed the pendant state law claims without prejudice. *Id.* Plaintiffs did not move to amend their complaint, and they took this appeal.

The propriety of granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is a question of law we review de novo. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). In reviewing the district court's ruling on the motion, we must accept plaintiffs' well-pleaded allegations as true and construe the complaint and inferences reasonably drawn from it in favor of plaintiffs. *Id.* The motion should be denied "unless it appears beyond doubt * * * plaintiff[s] can prove no set of facts [that] would entitle [them] to relief." *Id.*

Our task on this appeal is two-fold. First, we must determine if Sanderlin possessed a right arising under the fourteenth amendment to be protected by the state from harm inflicted by a third party—in this instance, a released criminal. Second, if she possessed this right, we must then decide whether defendants' conduct deprived her of it within the meaning of the due process clause.

Initially, we must consider defendants' argument that "there is no constitutionally mandated duty to protect one private citizen from another * * * beyond

[the confines of] prison[s] or prison-like environments." *Harpole*, 820 F.2d at 927. The district court assumed "*Harpole* effectively foreclose[d] any argument for [section] 1983 liability predicated upon" a vindicable right to affirmative protection by the state. *Wells*, 671 F.Supp. at 627. We believe, however, that *Harpole's* requirement of a prison-related environment is satisfied in this case by the transportation link between the prison and Sanderlin's store. Thus, we must consider whether plaintiffs have otherwise adequately pleaded circumstances giving rise to a right of protection in favor of Sanderlin.

As they must, plaintiffs acknowledge the general rule that members of the public at large have no constitutional right to be protected by the state against harm inflicted by third parties. *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982); *see also, e.g., Martinez v. California*, 444 U.S. 277, 285 (1980); *Commonwealth Bank & Trust Co., N.A. v. Russell*, 825 F.2d 12, 15 (3d Cir. 1987); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (en banc), *petition for cert. filed*, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987) (No. 87-521); *Nishiyama v. Dickson County*, 814 F.2d 277, 280-81 (6th Cir. 1987) (en banc); *DeShaney v. Winnebago County Dep't of Social Servs.* 812 F.2d 298, 301 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 1218 (1988); *Ketchum v. County of Alameda*, 811 F.2d 1242, 1247 (9th Cir. 1987); *Escamilla v. City of Santa Ana*, 796 F.2d 266, 270 (9th Cir. 1986); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720 (1st Cir.) *cert denied*, 107 S.Ct.

270 (1986); *Janan v. Trammell*, 785 F.2d 557, 560 (6th Cir. 1986); *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); *Estate of Bailey v. County of York*, 768 F.2d 503, 510 (3d Cir. 1985); *Jones v. Phyfer*, 761 F.2d 642, 646 (11th Cir. 1985); *Jensen v. Conrad*, 747 F.2d 185, 192-93 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *Wright v. City of Ozark*, 715 F.2d 1513, 1516 (11th Cir. 1983); *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983); *Humann v. Wilson*, 696 F.2d 783, 784 (10th Cir. 1983) (per curiam).

Circuit court decisions examining whether a particular individual, as distinguished from the general public, is entitled to protection by the state from third-party harm generally recognize that the due process clause may be implicated in the following situations: First, when a "special custodial or other relationship created or assumed by the state" exists between a particular individual and the state, *Fox*, 712 F.2d at 88; or second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have been in, *see Bowers*, 686 F.2d at 618. *See also, e.g., Taylor*, 818 F.2d at 797-98; *Nishiyama*, 814 F.2d at 280-81; *DeShaney*, 812 F.2d at 303; *Ketchum*, 811 F.2d at 1247; *Escamilla*, 796 F.2d at 269; *Estate of Gilmore*, 787 F.2d at 720-22; *Janan*, 785 F.2d at 560; *Ellsworth*, 774 F.2d at 185; *Estate of Bailey*, 768 F.2d at 509-11; *Jones*, 761 F.2d at 644-46; *Jensen*, 747 F.2d at 193-94; *Wright*, 715 F.2d at 1516; *Humann*, 696 F.2d at 784. We are in agreement with the other courts of appeals

that in these situations an affirmative right to protection by the state may arise in favor of the victim of private violence.

With this in mind, we must now determine if the factual allegations pleaded in plaintiffs' complaint are sufficient to invoke a constitutional claim against defendants for their failure to protect Sanderlin from harm inflicted by Robertson. We believe plaintiffs' complaint adequately pleads the basis of Sanderlin's right of protection. Plaintiffs allege defendants took action under Arkansas law to provide postrelease transportation for Robertson and to utilize Sanderlin's store as "the closest commercial transportation pick-up point." Ark. Code Ann. §12-29-112(b). These actions had the result of placing Sanderlin, unlike members of the general public, in a unique, confrontational encounter with a person whom plaintiffs allege had exhibited violent propensities. We thus agree with the district court's assessment that "the allegations of the complaint * * * when taken as true could support a finding of a 'close relationship' * * * or the existence of a 'special danger' to [Sanderlin]" in the context of a violation of Sanderlin's due process rights. *Wells*, 671 F.Supp at 626.

Having satisfied ourselves that plaintiffs' complaint adequately alleges Sanderlin possessed a right of protection secured by the fourteenth amendment, we must now decide whether defendants' conduct deprived

her of that right. Based on the allegations of the complaint, we conclude defendants' conduct did not work a deprivation of Sanderlin's right within the meaning of the due process clause.

Plaintiffs rely on allegations that defendants did not discover Robertson's potential for violence because they failed to conduct an adequate background investigation before releasing him. Plaintiffs claim defendants would have given Sanderlin the warning sought in their complaint if defendants had properly screened and processed Robertson for release.

From these factual allegations and all favorable inferences drawn from them, it is evident to us plaintiffs' section 1983 action is bottomed on a claim of ordinary negligence by the defendants. The Supreme Court, however, has held that negligent conduct by government officials cannot be the source of a "deprivation" of constitutional rights for section 1983 purposes. *See Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). We do not believe plaintiffs' allegations rise to the level of charging defendants with "an abuse of power * * * [and actually allege] no more than a failure to measure up to the conduct of a reasonable person" in processing Robertson's release. *Daniels*, 474 U.S. at 332. Therefore, it is "beyond doubt * * * plaintiff[s] can prove no set of facts [that] would entitle [them] to relief," *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986), and

defendants' motion to dismiss was properly granted.

We are mindful the Supreme Court in *Daniels* left open the possibility that "something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the [d]ue [p]rocess [c]lause" for purposes of a 42 U.S.C. §1983 action. *Daniels*, 474 U.S. at 334 n.3. We are not required to explore that issue here because we conclude the descriptions of defendants' conduct in the complaint belie their characterization as anything other than ordinary negligence in making the decision to release Robertson. *See Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) ("Negligence does not become 'gross' just by saying so."); *see also Tallman v. Reagan*, 846 F.2d 494, 495 (8th Cir. 1988) (per curiam) ("[G]ross negligence * * * does not implicate the due process clause" in *Bivens*-type action.). Basically, plaintiffs' complaint is a statement that with adequate investigation and proper screening, the defendants should have know they were releasing a dangerous individual; but as we recently observed, this kind of pleading "amounts to nothing more than [articulation of] a negligence standard." *Wilson v. Cross*, 845 F.2d 163, 165 (8th Cir. 1988).

By our decision we intend no opinion on the strength of plaintiffs' remaining claims under state law, and we do not take lightly the circumstances surrounding Sanderlin's tragic death. As the Supreme Court stated in

Daniels: "That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. * * * [I]njuries caused by such negligence should generally be redressed." *Daniels*, 474 U.S. at 333. In the context of a section 1983 cause of action, when "a government official's act causing injury to life, liberty, or property is merely negligent, 'no procedure for compensation is **constitutionally** required.' " *Id.* (quoted citation omitted) (emphasis in original).

The district court's dismissal of plaintiffs' complaint is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals
Eighth Circuit.

In the United States District Court
Eastern District of Arkansas
Pine Bluff Division

SUE WELLS, Administratrix of the
Estate of LAVERNE SANDERLIN, deceased,
et al PLAINTIFFS

V. NO. PB-C-87-384

WOODSON D. WALKER,
et al DEFENDANTS

MEMORANDUM AND ORDER

The defendants, Woodson D. Walker, Bobby L. Roberts, Morris H. Dreher, James Mason, Don Smith, A. L. Lockhart, Clifton Lambert and the Arkansas Department of Correction have moved to dismiss the complaint against them under Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow the defendants' motion is granted.

I. BACKGROUND

On July 10, 1986, Larry Dean Robertson was arrested in Jackson County, Arkansas and charged with theft by receiving and felon in possession of a firearm. Robertson had previously been convicted of aggravated

assault in the State of Mississippi and, at the time of his arrest in Arkansas, was wanted by Marshall County, Mississippi authorities on an outstanding felony charge. Robertson pled guilty to the Johnson County charge of felon in possession of a firearm, the theft count having been dismissed, and was sentenced to serve eighteen (18) months in a facility administered by the Arkansas Department of Correction.

On April 20, 1987, Robertson was granted an early release from custody as the result of the Arkansas State Board of Correction's invocation of the "Prison Overcrowding Emergency Powers Act of 1987," Act 418 of 1987. He was given a check for $25.00 and, in accord with Department of Correction policy, was transported to the Trailways Bus Station in Dumas, Arkansas because that was the nearest public transportation facility. Within the bus station was C & S Fabric, a store owned and operated by Laverne Sanderlin. On April 21, 1987, less than twenty-four (24) hours after his release, Robertson is alleged to have brutally murdered Laverne Sanderlin in her store. Robertson is presently standing trial for that crime in the state court.

The plaintiffs in this suit, representing the estate and family of Laverne Sanderlin and the taxpayers of the State of Arkansas, have filed their claim under 42 U.S.C. §1983 seeking damages for wrongful death from members of the Arkansas State Board of Correction, and the Director and an employee of the Arkansas

Department of Correction. Other claims have also been asserted under Arkansas tort law, Arkansas statutory law and the Arkansas Constitution.

II. 42 U.S.C. §1983

It is the plaintiffs' contention that the defendants, by their collective action in releasing and transporting Robertson, deprived Laverne Sanderlin of her life and "liberty interest" in personal security without due process of law as required by the Fourteenth Amendment. *See Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (unjustified intrusions on personal security are within the scope of due process "liberty" interest). The issue here is whether, assuming all the allegations of the complaint to be true, the deprivations complained of give rise to a cause of action under 42 U.S.C. §1983. The court finds that they do not.

To state a claim under §1983 it must be alleged that (1) the conduct of a person acting under color of state law (2) deprived a person of rights, privileges or immunities secured by the constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1980). At the time in question Robertson was not in state custody nor was he acting on behalf of the state. The brutal acts of which the plaintiffs complain were committed, if at all, by a private individual.

Nonetheless, the plaintiffs seek to hold the

defendants responsible for Robertson's alleged acts because they knew, or should have known, of Robertson's dangerous propensities but, in reckless disregard of the victim's interest in personal security, released him at her place of business anyway. The plaintiffs' argument is that a "special relationship" existed because of the defendants' knowledge and affirmative act of transportation, and that this relationship created a duty to protect or warn the victim.

The seminal case addressing the issue of whether §1983 liability may be predicated upon the negligent and reckless release from state custody of a dangerous inmate is *Martinez v. California*, 444 U.S. 277 (1980). In that case a parolee, who had been granted parole despite his history as a "Mentally Disordered Sex Offender not amenable to treatment," murdered a fifteen-year-old girl five months after his release. The Supreme Court assumed, as alleged in the complaint, that the parole board knew, or should have known, that the parolee's release created a clear and present danger such an incident would occur. *Id.* at 280.

Without dissent the court held that the action of the parolee could not be characterized as "state action" for the purpose of §1983 liability. Three reasons were given for this decision. First, a period of five months had elapsed between the parolee's release and the victim's murder. Second, the parolee was in no sense an agent of the parole board and, third, the parole board was not

aware the victim, as distinguished from the public at large, faced any special danger. However, the court went on to say that it did not decide "a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." *Martinez v. California*, 444 U.S. at 284-85.

The plaintiffs have attempted to distinguish *Martinez* on its facts and argue that this is the type of case for which the *Martinez* court left the door to §1983 liability open. They note particularly that less than twenty-four (24) hours elapsed between Robertson's release and the victim's murder, as opposed to five months in *Martinez*, and that Robertson was transported to the victim's place of business after the last bus for the day had run, thereby placing her in a position of "special danger."

In support of their argument the plaintiffs cite, *inter alia*, *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987). There, an inmate who held "trusty" status was given authorized and unsupervised use of a patrol car equipped with flashing lights by the defendant County. The complaint, brought under §1983, alleged that the inmate was operating the vehicle when he pulled over his victim on the highway and murdered her, and that the County's practice of providing a vehicle for his use caused a deprivation of the victim's constitutional rights. The Sixth Circuit agreed, distinguishing *Martinez*, and held that a claim was stated under §1983.

In reaching its conclusion, that a claim was stated under §1983, the *Nishiyama* court found to be important the facts that: (1) the inmate was in state custody before, during and after the murder; (2) the inmate was never reported as escaped even though he was absent for ten hours; and (3) the inmate was furnished with a fully equipped police car by the defendants. These facts, the court reasoned, created a sufficiently "close relationship" between the inmate's criminal acts and the defendant County's acts under color of state law. *Nishiyama v. Dickson County, Tennessee*, 814 F.2d at 280-81.

Arguably, the allegations of the complaint here when taken as true could support a finding of a "close relationship" similar to that found to exist in *Nishiyama* or the existence of a "special danger" to the victim such as was found lacking in *Martinez*. However, a recent Eighth Circuit case, which this court considers controlling, has severely circumscribed the factual situations under which a special relationship may be found. *See Harpole v. Arkansas Department of Human Services*, 820 F.2d 923 (8th Cir. 1987).

In *Harpole* the Arkansas Childrens Hospital, an agency of the State of Arkansas, released an infant to its mother's care despite allegations against her of abuse and neglect. Less than one month later the infant stopped breathing and died. The mother had forgotten

to turn on a monitor which would have sounded an alarm when the child stopped breathing—as she had also forgotten the day her third child had stopped breathing and died. Suit was brought under §1983 alleging the state agency violated the infant's constitutional rights by placing it in a dangerous environment.

In its opinion, the *Harpole* court discussed the *Martinez* decision and the decision of other U.S. Circuit Courts of Appeal in which knowledge of a dangerous situation was held to create a special relationship between the state agency and the victim and thereby place on the agency a duty to protect. *See supra, Martinez v. California; Estate of Bailey v. County of York*, 768 F.2d 503 (3rd Cir. 1985); *Jensen v. Conrad*, 747 F.2d 185, 190-94 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). But, in contrast with those decisions, the court held that the facts as alleged did not give rise to a §1983 action, and concluded its discussion by stating that

> [w]e agree with the Seventh Circuit that "[w]e can find no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of 'special relationships'." (quoting *DeShaney v. Winnebago County Dept. of Social Services*, 812 F.2d 298, 303-04 (7th Cir. 1987).
>
> ....

> . . . we should not rely solely on dicta, even Supreme Court dicta, when making decisions with constitutional implications. Logic and principle should control how much deference we give to the statement in *Martinez.*
>
> . . .
>
> Without [the massive state control found in the prison environment] there is no constitutionally mandated duty to protect one private citizen from another. We do not believe that the concept of special relationships was intended to extend beyond prison or prison-like environments.

Harpole v. Arkansas Dept. of Human Services, 820 F.2d at 926-27.

Under the facts as alleged in this case, *Harpole* effectively forecloses any argument for the §1983 liability predicated upon a finding of a special relationship. Robertson had been released from state custody prior to the alleged crime and was acting only as a private individual. The defendants may have been negligent or even reckless in releasing him, a question the court does not reach, but, under the law in this circuit, they were under no constitutionally mandated duty to protect private citizens from his actions once he was freed. *Id.* at 927. *See also Estate of Gilmore v. Buckley,* 787 F.2d 714

(1st Cir. 1986); *Jones v. Phyfer*, 761 F.2d 642 (11th Cir. 1985); *Jackson v. Byrne*, 738 F.2d 1443 (7th Cir. 1984); *Jackson v. City of Joliet*, 715 F.2d 1200 (7th cir. 1985), *cert. denied*, 465 U.S. 1049 (1984); *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983); *Bowers v. Devito*, 686 F.2d 616 (7th Cir. 1982) (no constitutional right to be protected by the state against being murdered by criminals or madmen). Because Robertson was acting only as a private individual, and the defendants were under no constitutional duty to protect others from his actions, the court must find that the "state action" or "under color of state law" requirement of §1983 was not satisfied and that, therefore, the plaintiffs' §1983 claim should be, and is hereby dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

The plaintiffs' remaining claims arise under Arkansas tort law, Arkansas statutory law and the Arkansas Constitution. The court believes that principles of comity and federalism require these claims, and the issues presented therein, to be heard first in the state courts of Arkansas and, for that reason, same are hereby dismissed without prejudice.

IT IS SO ORDERED this 15 day of October, 1987.

HENRY WOODS
U.S. District Judge

United States Court of Appeals
For the Eighth Circuit

No. 87-2547EA

Sue Wells, etc., et al,
Appellants,

vs.

Woodson D. Walker, et al,
Appellees.

Appeal from the United States District Court
For the Eastern District of Arkansas

Appellants' petition for rehearing has been considered by the Court and is denied.

August 24, 1988

Order entered at the Direction of the Court:
ROBERT D. ST. VRAIN,
Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

SUE WELLS, ADMINISTRATRIX OF THE ESTATE OF LAVERNE SANDERLIN, DECEASED, REPRESENTING HERSELF, BARBARA PATTON, JOHN SANDERLIN, TOM SANDERLIN, AND THE ESTATE OF THE DECEASED; and SUE WELLS, BARBARA PATTON, JOHN SANDERLIN, AND TOM SANDERLIN, INDIVIDUALLY AND AS TAXPAYERS OF THE STATE OF ARKANSAS
PLAINTIFFS

vs. No. 87-PB-C-87-384

WOODSON D. WALKER, BOBBY L. ROBERTS, PH.D., JAMES L. MASON, A. L. LOCKHART, and CLIFTON LAMBERT, IN THEIR INDIVIDUAL CAPACITIES; and WOODSON D. WALKER, BOBBY L. ROBERTS, PH.D., JAMES L. MASON, MORRIS "JIT" H. DREHER, and DONALD H. SMITH, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE ARKANSAS STATE BOARD OF CORRECTION, A. L. LOCKHART, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS DEPARTMENT OF CORRECTION, and

THE ARKANSAS DEPARTMENT
OF CORRECTION DEFENDANTS

COMPLAINT

For their causes of action Plaintiffs allege and state:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Sue Wells, Administratrix of the Estate of Laverne Sanderlin, deceased, is the duly appointed Administratrix of the Estate of Laverne Sanderlin, deceased, having been appointed by the Probate Court of Desha County, Arkansas on May 15, 1987, in case number PA-87-21-I. Letters of Administration were issued on May 18, 1987.

2. Sue Wells, Barbara Patton, John Sanderlin, and Tom Sanderlin are the only children of Laverne Sanderlin, deceased.

3. Laverne Sanderlin, at the time of her death in Desha County, Arkansas on April 21, 1987, was a resident and citizen of Desha County, Arkansas.

4. Plaintiff Sue Wells is a resident, citizen, and taxpayer of Desha County and the State of Arkansas.

5. Plaintiff Barbara Patton is a resident, citizen, and

taxpayer of Jefferson County and the State of Arkansas.

6. Plaintiff John Sanderlin is a resident, citizen, and taxpayer of Sevier County and the State of Arkansas.

7. Plaintiff Tom Sanderlin is a resident, citizen, and taxpayer of the Greenwood District of Sebastian County and the State of Arkansas.

8. Defendant Woodson D. Walker is a resident and citizen of Pulaski County, Arkansas.

9. Defendant Bobby L. Roberts, Ph.D., is a resident and citizen of Pulaski County, Arkansas.

10. Defendant James L. Mason is a resident and citizen of Arkansas County, Arkansas.

11. Defendant A. L. Lockhart is a resident and citizen of Lincoln County, Arkansas.

12. Defendant Clifton Lambert is a resident and citizen of Lincoln County, Arkansas.

13. Defendant Morris "Jit" H. Dreher is a resident and citizen of Lincoln County, Arkansas.

14. Defendant Donald H. Smith is a resident and citizen of Jefferson County, Arkansas.

15. Defendant Arkansas Department of Correction is an agency of the State of Arkansas with its principal office located in Jefferson County, Arkansas.

16. Defendants Woodson D. Walker, Bobby L. Roberts, Ph.D., James L. Mason, Morris "Jit" H. Drewer, and Donald H. Smith are members of the Arkansas State Board of Correction.

17. Defendant A. L. Lockhart is the Director of the Arkansas Department of Correction.

18. Defendant Clifton Lambert is an employee of the Arkansas Department of Correction, holding the rank of Major, assigned to the Varner Unit.

19. Plaintiff Sue Wells, Administratrix of the Estate of Laverne Sanderlin, deceased, representing herself, Barbara Patton, John Sanderlin, Tom Sanderlin, and the estate of the deceased, brings this wrongful death action for compensatory and punitive damages against Defendants Woodson D. Walker, Bobby L. Roberts, Ph.D., James L. Mason, A. L. Lockhart, and Clifton Lambert in their individual capacities.

20. Plaintiffs Sue Wells, Barbara Patton, John Sanderlin, and Tom Sanderlin, individually and as taxpayers of the State of Arkansas, bring this taxpayers' suit for declaratory judgment and injunctive relief against Defendants Woodson D. Walker, Bobby L.

Roberts, Ph.D., James L. Mason, Morris "Jit" H. Drewer, and Donald H. Smith in their official capacities as members of the Arkansas State Board of Correction, Defendant A. L. Lockhart, in his official capacity as Director the Arkansas Department of Correction, and Defendant Arkansas Department of Correction.

21. The matter in controversy exceeds the sum or value of Ten Thousand Dollars, exclusive of interest and costs.

22. These causes of action arise under 42 U.S.C. §§1983 and 1988; Article XVI, §13, Constitution of Arkansas; Act 418 of 1987, Acts of Arkansas; and State Tort Law.

23. This Court has jurisdiction of these actions under 28 U.S.C. §§1331, 1343, and 2201 and the pendent jurisdiction of this Court.

BACKGROUND FACTS

24. On July 10, 1986, Larry Dean Robertson was arrested on Interstate 40 in Johnson County, Arkansas and subsequently charged with Theft by Receiving and Felon in Possession of a Firearm. At the time of his arrest, Robertson was wanted in Marshall County, Mississippi for Grand Larceny and Burglary of a Dwelling. On September 4, 1986, Robertson entered a plea of guilty to the charge of Felon in Possession of a

Firearm in Johnson County Circuit Court and was sentenced to serve for 18 months in the Arkansas Department of Correction. Robertson was given credit for 56 days of jail time served. The charge of Theft by Receiving was dismissed. Prior to his conviction in Johnson County Circuit Court, Robertson had been convicted of Aggravated Assault in the State of Mississippi.

25. On November 10, 1986, Robertson was transported to the Arkansas Department of Correction from the Johnson County Jail where he had been confined continuously since his arrest on July 10.

26. On January 29, 1987, Robertson appeared before the Arkansas Board of Pardons and Paroles. The Parole Board paroled Robertson to a detainer only, which means that he was not eligible for release except to the detainer from Marshall County, Mississippi. If Marshall County, Mississippi did not pick up Robertson, as it did not do, Robertson was not eligible for release on parole until he appeared before the Parole Board again. Robertson never appeared before the Parole Board after January 29, 1987.

27. On March 26, 1987, Governor Bill Clinton signed Act 418 of 1987 which is entitled "The Prison Overcrowding Emergency Powers Act of 1987." Act 418 had an emergency clause and became effective immediately. It also specifically repealed Act 223 of

1983. Act 223 of 1983 was entitled the "Prison Overcrowding Emergency Powers Act." Act 223 of 1983 authorized the Governor to declare a prison overcrowding state of emergency and commute or otherwise reduce the sentence of certain certified inmates by 90 days. Act 223 of 1983 did not have an emergency clause. Therefore, it became effective 90 days after the General Assembly adjourned on April 4, 1983. From its effective date 90 days after the General Assembly adjourned until its repeal on March 26, 1987, the Governor did not declare a prison overcrowding state of emergency or commute or otherwise reduce the sentence of any certified inmate by 90 days.

28. On April 17, 1987, the Arkansas State Board of Correction met in regular session at the Benton Unit. Board members present were Defendants Woodson D. Walker, Bobby L. Roberts, Ph.D., and James L. Mason. Board members absent were defendants Morris "Jit" H. Dreher and Donald H. Smith. Department of Correction personnel present included Defendant A. L. Lockhart.

29. At the meeting on April 17, 1987, copies of the daily population report as of 8:00 a.m. that day were distributed. Defendant Lockhart reported that the Department's capacity was 4,920 and as of 8:00 a.m., April 17 the count was 4,881. He reported that there were 450 individuals backed up in county jails and 11 on county jail contracts. Therefore, as of 8:00 a.m. on April 17, 1987, according to Defendant Lockhart, the

Department was responsible for a total of 5,342 inmates. Defendant Lockhart reported that from March 19 until April 17 the Department had gained 118 inmates and that over the past two months there had been a 4.1 net gain per day.

30. Defendant Lockhart then referred to information concerning Act 418. He reported that one possible short-term relief would be to invoke Act 418. He reported that parole eligibility dates of Class I and Class II inmates would be accelerated by 90 days. The list of such inmates included 90 who had discharge dates within the next 90 days, 94 who had been granted parole and were awaiting parole eligibility dates, 160 who were scheduled for April Parole Board and 103 who were scheduled for the May Parole Board.

31. Defendant Mason then moved that the Board declare that there was a prison overcrowding state of emergency; that the Board accept the Director's certification of the inmates who were Class I and Class II, that the Board authorize the release of all inmates contained on the list, except those that the Director identified to the Board by Wednesday, April 22, as being exempted or that any Board member would so identify; and that Defendant Lockhart contact A. Carter Hardage, Assistant Attorney General regarding technically complying with Act 418. Defendant Roberts seconded the motion and it carried unanimously.

32. On Monday, April 20, 1987, Robertson was released by the Department of Correction pursuant to the action of the Board at its regular meeting on Friday, April 17, 1987.

33. Prior to his release, Robertson was given a check for $25.00 by the Department of Correction.

34. Defendant Lambert took Robertson to C & S Fabric in Dumas, Desha County, Arkansas and released him. C & S Fabric was owned and operated by Laverne Sanderlin. It also served as the Trailways Bus Station. Robertson was released at C & S Fabric at approximately 6:50 p.m. on April 20, 1987.

35. Two Trailway buses a day ran through Dumas: one going from Little Rock to Monroe, Louisiana at 11:54 a.m. and the other going from Monroe, Louisiana to Little Rock at 6:30 p.m. When Robertson was released the last bus for the day had already run.

36. The following day, Tuesday, April 21, 1987, inside C & S Fabric, at approximately 1:30 p.m., Robertson brutally murdered Laverne Sanderlin by stabbing her in the eye with a pair of scissors.

FIRST CAUSE OF ACTION—42 U.S.C.A. §1983

37. At all times pertinent hereto, Defendants Woodson D. Walker, Bobby L. Roberts, Ph.D., and

James L. Mason were members of the Arkansas State Board of Correction and in doing the acts and failing to do the acts herein set forth were acting in their capacity as stated under color of the statutes, ordinances, regulations, customs, and usages of the State of Arkansas, particularly Act 418 of 1987. As members of the Board, Defendants Walker, Roberts and Mason were responsible for establishing and implementing the policy of the Department of Correction.

38. At all times pertinent hereto, Defendant A. L. Lockhart was the Director of the Arkansas Department of Correction. In doing and failing to do the acts herein set forth, Defendant Lockhart was acting in his capacity as stated under color of the statutes, ordinances, regulations, customs and usages of the State of Arkansas, particularly Act 418 of 1987. The acts and omissions of Defendant Lockhart are imputed to Defendants Walker, Roberts, and Mason by reason of agency.

39. At all times pertinent hereto, Defendant Clifton Lambert was an employee of the Department of Correction with the rank of Major. He was assigned to the Varner Unit. In doing and failing to do the acts herein set forth, Defendant Lambert was acting in his capacity as stated under color of the statutes, ordinances, regulations, customs, and usages of the State of Arkansas. The acts and omissions of Defendant Lambert are imputed to Defendants Walker, Roberts, Mason, and Lockhart by reason of agency.

40. Defendants Walker, Roberts, Mason, Lockhart, and Lambert, acting under color of state law, subjected Laverne Sanderlin to the deprivation of rights, privileges, and immunities secured to her by the Constitution and laws of the United States, particularly those secured by the Fourth, Fifth, and Fourteenth Amendments, United States Constitution, and her liberty interest in personal security.

41. Act 418 of 1987, entitled, "The Prison Overcrowding Emergency Powers Act of 1987," is patently unconstitutional because it violates Article IV, §2 and Article VI, §18, Constitution of Arkansas.

42. Defendants Walker, Roberts, Mason, and Lockhart knew or should have known that Act 418 was unconstitutional.

43. Act 418 of 1987 had not been effective for thirty consecutive days when Defendants Walker, Roberts, and Mason attempted to declare a prison overcrowding state of emergency.

44. Defendants Walker, Roberts, Mason, and Lockhart did not determine that the population of the prison system exceeded 98% of the rated capacity for thirty consecutive days prior to attempting to declare a prison overcrowding state of emergency.

45. Defendants Walker, Roberts, and Mason did not certify the rated capacity and current population of the prison system prior to attempting to declare a prison overcrowding state of emergency.

46. Defendants Walker, Roberts, and Mason did not certify that all authorized actions consistent with applicable state laws and regulations had been exhausted in an attempt to reduce the prison population to 98% of the rated capacity prior to attempting to declare a prison overcrowding state of emergency.

47. Defendant Lockhart did not certify to Defendants Walker, Roberts, and Mason a list of Class I and Class II inmates and did not indicate which inmates he recommended for discharge.

48. Defendants Walker, Roberts, and Mason did not act to move up the projected parole eligibility and/or minimum release dates of any or all inmates on the list by up to 90 days.

49. Defendants Walker, Roberts, and Mason did not certify to Defendant Lockhart a list of names of all prisoners whose projected parole eligibility and/or minimum release dates were affected by the provisions of Act 418 of 1987.

50. Defendants Walker, Roberts, Mason, and Lockhart did not properly screen the inmates to be

discharged.

51. Defendants Walker, Roberts, Mason, and Lockhart did not give inmate Robertson and others sufficient advance notice of their pending discharge to permit them to make satisfactory arrangements for assimilation back into the free world.

52. Defendants Walker, Roberts, Mason, and Lockhart did not provide inmate Robertson and others with adequate counseling or resources to make the transition back into the free world.

53. Defendants Walker, Roberts, Mason, and Lockhart did not do an adequate check into the background and psychiatric history of inmate Robertson to determine whether he had violent propensities and presented a clear and present danger to himself and others.

54. Defendants Walker, Roberts, Mason, and Lockhart did not confer with law enforcement authorities in Johnson County, Arkansas as to the circumstances surrounding the arrest and conviction of Robertson.

55. Defendants Walker, Roberts, Mason, and Lockhart did not attempt to have Marshall County, Mississippi authorities pick up Robertson or transport Robertson to Marshall County, Mississippi where he was

still wanted for Grand Larceny and Burglary of a Dwelling.

56. Defendant Lambert, acting pursuant to the policies and procedures of Defendants Walker, Roberts, Mason, and Lockhart, released Robertson, who had been convicted of a violent crime and had exhibited vicious propensities, at the Trailways Bus Station in Dumas, Arkansas after the last bus for the day had run and without sufficient resources to provide for the necessities of life, such as food, lodging, and transportation.

57. Defendant Lambert failed to warn Laverne Sanderlin that he was releasing at her store an inmate who had been convicted of a violent crime and demonstrated vicious propensities.

58. The acts and omissions of Defendants Walker, Roberts, Mason, Lockhart, and Lambert were willful, wanton, reckless, deliberately and callously indifferent, grossly negligent, and in reckless disregard of the consequences from which malice may be inferred.

SECOND CAUSE OF ACTION—NEGLIGENCE

59. Defendants Walker, Roberts, Mason, Lockhart, and Lambert were guilty of negligence which was a proximate cause of Plaintiff Wells's, Administratrix of the Estate of Laverne Sanderlin, deceased, damages,

such negligent acts being:

(a) Acting pursuant to Act 418 of 1987 when they knew or should have known that the Act was unconstitutional;

(b) Violating the provisions of Act 418 of 1987;

(c) Failing to properly screen the inmates to be discharged;

(d) Failing to give inmate Robertson and others sufficient advance notice of their pending discharge to permit them to make satisfactory arrangements for assimilation back into the free world;

(e) Failing to provide inmate Robertson and others with adequate counseling or resources to make the transition back into the free world;

(f) Failing to do an adequate check into the background and psychiatric history of inmate Robertson to determine whether he had violent propensities or presented a clear and present danger to himself and others;

(g) Failing to confer with law enforcement authorities in Johnson County, Arkansas as to the circumstances surrounding the arrest and conviction of Robertson;

(h) Failing to attempt to have Marshall County, Mississippi authorities pick up Robertson at the time of his discharge;

(i) Failing to transport Robertson to Marshall County, Mississippi where he was still wanted for Grand Larceny and Burglary of a Dwelling;

(j) Releasing Robertson, who had been convicted of a violent crime and had exhibited vicious propensities, at the Trailways Bus Station in Dumas, Arkansas after the last bus for the day had run and without sufficient resources to provide for the necessities of life, such as food, lodging and transportation;

(k) Failing to warn Laverne Sanderlin that they were releasing at her store an inmate who had been convicted of a violent crime and demonstrated vicious propensities;

(l) Failing to exercise proper control and supervision over inmate Robertson until he had reached a destination where he could make satisfactory arrangements to obtain the necessities of life, such as employment, food, lodging, clothing, and transportation in a lawful manner; and

(m) Failing to use ordinary care for the safety of Laverne Sanderlin and others.

60. Such negligence proximately caused the death of Laverne Sanderlin.

THIRD CAUSE OF ACTION
—OUTRAGEOUS CONDUCT

61. The actions of Defendants Walker, Roberts, Mason, Lockhart, and Lambert were so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

FOURTH CAUSE OF ACTION
—VIOLATION OF STATUTE

62. Even if Act 418 of 1987 were constitutional, Defendants Walker, Roberts, Mason, and Lockhart violated the Act in the following particulars:

(a) Attempting to declare a prison overcrowding state of emergency before the Act had been effective for 30 consecutive days when the Act required that the population of the prison system exceed 98% of the rated capacity for thirty consecutive days before a prison overcrowding state of emergency could be declared;

(b) Failing to determine that the population of the prison system exceeded 98% of the rated capacity for

thirty consecutive days prior to attempting to declare a prison overcrowding state of emergency;

(c) Failing to certify the rated capacity and current population of the prison system prior to attempting to declare a prison overcrowding state of emergency;

(d) Failing to certify that all authorized actions consistent with applicable state laws and regulations had been exhausted in an attempt to reduce the prison population to 98% of the rated capacity prior to attempting to declare a prison overcrowding state of emergency;

(e) Failing to certify and have certified a list of Class I and Class II inmates and indicating and having the Director indicate which inmates he recommended for discharge;

(f) Failing to act to move up the projected parole eligibility and/or minimum release dates of any or all inmates on the list by up to 90 days; and

(g) Failing to certify a list of names of all prisoners whose projected parole eligibility and/or minimum release dates were affected by the provisions of the Act.

63. Such violations of the Act proximately caused the death of Laverne Sanderlin.

COMPENSATORY DAMAGES

64. Plaintiff Sue Wells, Administratrix of the Estate of Laverne Sanderlin, Deceased, is entitled to recover from Defendants, jointly and severally, for the following damages:

(a) Mental anguish suffered by Sue Wells, daughter of Laverne Sanderlin, in an amount to be proved at trial;

(b) Mental anguish suffered by Barbara Patton, daughter of Laverne Sanderlin, in an amount to be proved at trial;

(c) Mental anguish suffered by John Sanderlin, son of Laverne Sanderlin, in an amount to be proved at trial;

(d) Mental anguish suffered by Tom Sanderlin, son of Laverne Sanderlin, in an amount to be proved at trial;

(e) The reasonable value of funeral expenses in the sum of Three Thousand Seven Hundred Dollars ($3,700.00);

(f) The reasonable value of medical expenses attributed to the fatal injury in the amount of Six Hundred Seventy Five Dollars ($675.00); and

(g) Conscious pain and suffering of Laverne Sanderlin prior to her death in an amount to be proved

at trial.

65. Damages sought by Plaintiff Wells exceed the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

PUNITIVE DAMAGES

66. Defendants Walker, Roberts, Mason, Lockhart, and Lambert knew or ought to have known, in the light of the surrounding circumstances, that their conduct would naturally or probably result in injury and that they continued such conduct with malice or in reckless disregard of the consequences from which malice may be inferred, so that Plaintiff Sue Wells, Administratrix of the Estate of Laverne Sanderlin, deceased, is entitled to recover punitive damages in the amount of One Million Dollars from Defendants, jointly and severally, to punish the wrongdoers and deter others from similar conduct.

FIFTH CAUSE OF ACTION
—DECLARATORY JUDGMENT

67. Act 418 of 1987, entitled, "The Prison Overcrowding Emergency Powers Act of 1987," is patently unconstitutional because it violates Article IV, §2 and Article VI, §18, Constitution of Arkansas.

68. Any attempt by the State of Arkansas, by Constitution, statute, rule, regulation, custom, usage, or

judicial interpretation, to immunize Defendants in their individual or official capacities from tort liability or restrict Plaintiffs' remedy for redress denies Plaintiffs due process of law and equal protection of the laws in violation of the Fifth and Fourteenth Amendments, United States Constitution.

69. An actual controversy exists between Plaintiffs individually and as taxpayers of the State of Arkansas and Defendants.

70. This Court should declare Act 418 of 1987 unconstitutional because it violates Article IV, §2 and Article VI, §18, Constitution of Arkansas.

71. This Court should declare that any attempt by the State of Arkansas, by Constitution, statute, rule, regulation, custom, usage, or judicial interpretation, to immunize Defendants in their individual or official capacities from tort liability or restrict Plaintiffs' remedy for redress denies Plaintiffs due process of law and equal protection of the laws in violation of the Fifth and Fourteenth Amendments, United States Constitution.

SIXTH CAUSE OF ACTION
—ILLEGAL EXACTIONS

72. Act 418 of 1987 is unconstitutional.

73. Compliance with Act 418 to reduce the

population of the prison system requires an expenditure of public funds.

74. The expenditure of public funds pursuant to Act 418 constitutes an illegal exaction in violation of Article XVI, §13, Constitution of Arkansas

INJUNCTIVE RELIEF

75. The Board of Correction is scheduled to meet again on Friday, July 17, 1987.

76. News media reports have indicated that the Board may invoke the Prison Overcrowding Emergency Powers Act of 1987 at its next meeting.

77. Plaintiffs as individuals and taxpayers of the State of Arkansas, and all citizens of the State of Arkansas represented by Plaintiffs, will suffer irreparable injury, loss, and damage if Defendants release inmates pursuant to Act 418 of 1987.

78. Plaintiffs as individuals and taxpayers of the State of Arkansas have no adequate remedy of law for Defendants' actions in the future pursuant to Act 418 of 1987.

79. The Court should enter a preliminary and permanent injunction prohibiting Defendants from releasing inmates from the prison system pursuant to Act

418 of 1987.

ATTORNEY'S FEES—42 U.S.C. §1988

80. This is an action of proceeding to enforce a provision of 42 U.S.C. §1983 for the vindication of civil rights so that Plaintiffs should be allowed a reasonable attorney's fee as part of the costs.

DEMAND FOR JURY TRIAL

81. Pursuant to Rule 38, Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury of all issues triable of right by a jury.

WHEREFORE, Plaintiff Sue Wells, Administratrix of the Estate of Laverne Sanderlin, Deceased, representing herself, Barbara Patton, John Sanderlin, Tom Sanderlin, and the estate of the deceased, prays that she have and recover of Defendants Woodson D. Walker, Bobby L. Roberts, Ph.D., James L. Mason, A. L. Lockhart, and Clifton Lambert, in their individual capacities, jointly and severally, compensatory damages in an amount to be proved at trial, but exceeding Ten Thousand Dollars, exclusive of interest and costs, and punitive damages in the amount of One Million Dollars.

AND WHEREFORE, Plaintiffs, individually and as taxpayers of the State of Arkansas, pray that the Court declare Act 418 of 1987 unconstitutional; and that the

Court declare that any attempt by the State of Arkansas, by Constitution, statute, rule, regulation, custom, usage, or judicial interpretation, to immunize Defendants in their individual or official capacities from tort liability or restrict Plaintiffs' remedy for redress denies Plaintiffs due process of law and equal protection of the laws in violation of the Fifth and Fourteenth Amendments, United States Constitution.

AND WHEREFORE, Plaintiffs pray that the Court enter a preliminary and permanent injunction prohibiting Defendants from releasing or discharging inmates from the prison system pursuant to Act 418 of 1987.

AND WHEREFORE, Plaintiffs pray that they be allowed a reasonable attorney's fee as part of the costs and that they have all other relief to which they may be entitled whether specifically prayed for herein or not.

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